No. 90-1329

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In re: KOREA SHIPPING CORP., LTD.,
Now Known as HANJIN CONTAINER LINES, INC.,
Owner of the Korean Wonis One, For Exoneration
From or Limitation of Liability

KOREA SHIPPING CORP., LTD.,

Petitioner,

vs.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD.;
(Additional Respondents continued on reverse side.)

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

Additional Respondents:

MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; AMERICAN TRADING & PRODUCTS CORPORATION; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba WHOLESALE WORLD; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.; CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL

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QUESTION PRESENTED

Is the recovery fund under the maritime law of limitation of liability now to be chosen by reference to the choice of law principles set out in *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

PARTIES TO THE PROCEEDING

Rule 29.1 List Of Parent And Subsidiary Companies

The undersigned counsel are unaware of any subsidiaries of their clients other than wholly owned subsidiaries.

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vs.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD.; MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; AMERICAN TRADING & PRODUCTS CORPORATION; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba WHOLESALE WORLD; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.; CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER

TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 919 F.2d 601 (9th Cir. 1990), and is attached as Appendix A to petitioner's petition.

The order of the District Court is reported at 1990 A.M.C. 190 (C.D. Cal. 1989) and is attached as Appendix B to petitioner's petition.

JURISDICTION

Respondents agree with petitioner's statement of jurisdiction except to note that the petition is timely under Supreme Court Rule 13.1.

STATEMENT OF THE CASE

Petitioner, Korea Shipping Corp., Ltd. was the owner and operator of the containership KOREAN WONIS ONE. Petitioner was carrying cargo from various non-Korean far east ports to Los Angeles. Approximately forty containers of cargo bound for Los Angeles and other United States destinations were damaged by water while on board the KOREAN WONIS ONE in Korean waters. The damaged cargo was discharged from the KOREAN WONIS ONE in Los Angeles and was delivered to the consignees in the United States.

Petitioner filed an action in the United States District Court for the Central District of California to limit its liability under 46 U.S.C. App. § 183. The minimum value of the vessel and freight then pending was approximately $1,320,000. Claims totaling less than that sum were filed.

The liabilities which petitioner sought to limit were for damage to cargo carried by sea in international commerce. The parties agreed in the District Court that those liabilities were governed by the United States Carriage Of Goods By Sea Act ("U.S. COGSA"), 46 U.S.C. App. § 1300 *et. seq.*

The District Court dismissed the limitation action for lack of jurisdiction because an action may be brought under United States limitation law only when the total claims asserted exceed the value of the vessel. The District Court held that the amount to which liability could be limited was determined by United States law, not the law of South Korea since United States law governed the substantive rights and liabilities of the parties.

The Court of Appeals for the Ninth Circuit affirmed. It held that under *Oceanic Steam Navigation Company v. Mellor (The TITANIC)*, 233 U.S. 718 (1914) United States law governed the size of the limitation fund where the liabilities sought to be limited were created and governed by United States law. The Ninth Circuit held that no choice of law issue was presented because the parties had stipulated that U.S. COGSA governed petitioner's substantive liability.

INTRODUCTION

Certiorari should be denied. Petitioner seeks review on the ground that the opinion of the Ninth Circuit conflicts with the choice of law rules set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). There is no conflict. This case presents no choice of law issue, thus *Lauritzen* does not apply. The parties agree that by statutory mandate as well as contractual choice, their substantive rights and liabilities are governed by the United States Carriage of Goods by Sea Act ("U.S. COGSA"), 46 U.S.C. App. §§ 1300-1315. Petitioner further seeks to conduct a second choice of law determination, something not only neither required

nor suggested by *Lauritzen*, but also not authorized by the language of the limitation statute at issue..

Maritime limitation of liability law in the United States is statutory. It is contained in the Limitation of Liability Act, 46 U.S.C. App. §§ 183-189. Petitioner's policy goal of bringing U.S. Limitation law into conformity with the maritime law of other nations requires legislative action. Without legislative action, even approaching such a policy result would require ignoring the plain language of the statute as well as overruling *Oceanic Steam Navigation Company v. Mellor (The TITANIC)*, 233 U.S. 718 (1914), steps which are not necessary to a ruling in this matter. Thus, even if petitioner's policy argument were attractive to the Court, the record in this case does not provide the necessary basis for such a decision.

Petitioner's belief that this is a choice of law case is the result of a misunderstanding of *Black Diamond Steamship Corporation v. Robert Stewart & Sons (The NORWALK VICTORY)*, 336 U.S. 386 (1949). In its opinion in this matter,[1] the Ninth Circuit provided the best explanation of the effect and operation of *Black Diamond* to have been given by any lower court. The issues being litigated in this matter are raised infrequently. The Ninth Circuit's opinion was only the ninth reported decision since *Black Diamond* to consider these issues.[2] While the issues are important to the parties, they are relatively unimportant to the large scale development of admiralty law.

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[1] *In Re Korea Shipping Corp., Ltd.*, 919 F.2d 601 (9th Cir. 1990).

[2] The others are: *Accinanto v. Cosmopolitan Shipping Co.*, 100 F. Supp. 826 (D. Md. 1951); *Petition of Chadade Steamship Co.*, 266 F. Supp. 517 (S.D. Fla. 1967); *Complaint of Ta Chi Navigation (Panama) Corp. S.A.*, 416 F. Supp. 371 (S.D.N.Y. 1976); *Matter of Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980) and 435 F. Supp. 944 (N.D. Ohio 1976); *Matter of Bowoon Sangsa Co., Ltd.*, 720 F.2d 595 (9th Cir. 1983); *Complaint of Geophysical Service, Inc.*, 590 F. Supp. 1346 (S.D. Tex. 1984); and *Complaint of K.S. Line Corp.*, 596 F. Supp. 1268 (D. Alaska 1984).

REASONS FOR DENYING THE PETITION

1. There Is No Conflict With Lauritzen.

Petitioner seeks to limit its liability under the Limitation of Liability Act, 46 U.S.C. App. §§ 183-189. Petitioner wishes to enforce all the provisions of that Act except for those which set the amount of the limitation fund. There, petitioner would import the law of South Korea to set the limitation fund at a sum lower than that set by the Limitation Act. No Supreme Court decision authorizes such a procedure.

Ever since *The SCOTLAND*, 105 U.S. 24 (1882), the Limitation Act has applied to foreign flag vessels. *Oceanic Steam Navigation Company v. Mellor*, *supra* which resulted from the sinking of the TITANIC, held that in an action under the U.S. Limitation Act, the amount to which liability would be limited could not be greater than the amount specified by the U.S. Limitation Act even if the law of the vessel's flag permitted a greater liability. 233 U.S. at 733.

Oceanic Steam remains the law today. It was not changed by the widely misunderstood decision in *Black Diamond Steamship Corp. v. Robert Stewart & Sons*, *supra*. *Black Diamond* held simply that the U.S. Limitation Act could not operate to expand a right of recovery created by foreign law which provided for only limited damages. *Black Diamond* was not a *choice* of law decision. The law (Belgian law there) had been chosen. The issue was what were the boundaries of the chosen Belgian law.

Black Diamond stemmed from a ship collision in Belgian territorial waters. The owner and charterer of the NORWALK VICTORY filed a limitation action in the United States. The NORWALK VICTORY interests failed to post a bond for the full amount of their potential liability under the U.S. Limitation Act. Instead, they contended that they were entitled to rely upon the limitation law of Belgium, the Limitation Convention of 1924. Liability under Belgian limitation law was lower than that under U.S. Law. The District Court dismissed the limitation petition because the charterer failed to post the amount of security required by the U.S. Limitation Act. The Second Circuit affirmed.

The Supreme Court held that security had to be posted in the amount required by the U.S. Limitation Act, but reversed and remanded to permit the charterer an opportunity to post that security. 336 U.S. at 394-395. The Court then discussed whether the Belgian limitation law could ever be applied in a U.S. limitation action. The Court stated:

> On this point we agree with the Court of Appeals -- and disagree with the District Court -- that if, indeed, the Belgian limitation attaches to the right, then nothing in *Oceanic Steam Nav. Co. v. Mellor (THE TITANIC)* [citation] stands in the way of observing that limitation. The Court in that case was dealing with "a liability assumed already to exist on other grounds." [citations] But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover.
>
> 336 U.S. at 395-396.

The Court continued:

> If, on the other hand, the Convention merely provides procedural machinery by which claims otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund, we would respect the equally well settled principle that the forum is not governed by foreign rules of procedure.
>
> 336 U.S. at 396.

Black Diamond stands for the proposition that a cause of action governed by foreign law can only be enforced to the extent that it exists under foreign law. Thus, the U.S.

Limitation Act cannot be used to expand a right of recovery which only exists in a limited form. If normal choice of law rules established that a cause of action was governed by foreign law (as was the case in *Black Diamond*), then all of the substantive foreign law which created and defined that cause of action must be applied. *Black Diamond* did not hold that the U.S. courts should apply a foreign limitation law whenever that law was part of the substantive law of the foreign country. In this manner, *Black Diamond* was really not a choice of law decision. Rather, its goal was to find the boundaries of the applicable foreign law.

Lauritzen did not affect the holding in *Black Diamond*. It established general choice of law rules for use in maritime tort actions. The *Lauritzen* opinion recognized that legislative dictates on choice of law issues prevailed over general choice of law rules. 345 U.S. at 579 n. 7. It also recognized the general enforceability of contractual choice of law provisions. 345 U.S. at 588-589. Here, by its own terms, U.S. COGSA governs the rights and liabilities of the parties. 46 U.S.C. App. § 1312. In addition, petitioner's bills of lading provide for the application of U.S. COGSA. In the District Court, and before the Court of Appeals, the litigants agreed that U.S. COGSA governed. That being so, there is no choice of law determination to be made and *Lauritzen v. Larsen* does not apply to this dispute.

2. A Second Choice Of Law Determination Need Not Be Made.

The critical failure in petitioner's argument is the assumption that there is any role for choice of law analysis in limitation of liability proceedings. There is none.

The Limitation Act provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or

> forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.
>
> 46 U.S.C. App. § 183(a).

In *Oceanic Steam*, Mr. Justice Holmes read the Act to mean what it said. He explained:

> It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. [citations] It is competent, therefore, for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out.
>
> 233 U.S. at 732. (quoted in *Lauritzen v. Larsen*, 345 U.S. at 591, n. 27.)

The only "choice of law analysis" contemplated by either *Oceanic Steam* or *Black Diamond* is that which determines which nation's law creates and governs the causes of action and defenses at issue.

Both *Black Diamond* and *Oceanic Steam* recognize that any choice of limitation law has already been made by Congress. It is for that reason that the Court in *Black Diamond* focused on whether the Belgian limitation "attached to the right" of recovery so that only a limited right was available to be enforced in any court. In *Oceanic Steam*, the Court was more direct. It stated:

> For on what ground was the limitation of liability allowed in The Scotland or La Bourgogne?[3] Not on their being subject to the act of Congress or any law of the United States in their conduct, but if not on that ground, then it must have been because our statute permits a foreign vessel to limit its liability according to the act when sued in the United States.
>
> 233 U.S. at 733.

It is one thing for the courts to take the step contemplated in *Black Diamond* and apply foreign law to enforce the rights created by foreign law only to the extent that they exist. It is another to take the step contemplated by petitioner and apply foreign limitation law to rights which the parties agree are created and governed by U.S. law.

Limitation is a statutory right. As petitioner notes, it does not exist in the general maritime law.[4] Petitioner does not seek to apply the limitation law of South Korea to determine whether it is entitled to limit its liability. For that area, petitioner uses the U.S. Limitation Act and its requirement that the vessel owner not have "privity" or "knowledge" of the cause of the loss. Petitioner only seeks to apply South Korean law to set the financial limit of its liability.

From a choice of law perspective, petitioner's position makes little sense. If there is to be choice of law in limitation, why limit that choice of law to the limitation amount? Why not also incorporate South Korean law to determine whether petitioner has the right to limit its liability?

Even if the plain language of the Limitation Act did not need to be ignored to proceed as petitioner desires, judicial efficiency, fairness and predictability are simply not served

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[3] *Deslions v. La Compagnie Generale Transatlantique*, 210 U.S. 95 (1908).

[4] Petition For Writ Of Certiorari, p. 5.

by conducting a second choice of law analysis for limitation of liability. Choice of law principles, be they statutory mandate (U.S. COGSA), contractual choice (petitioner's bill of lading) or *Lauritzen v. Larsen* do need to be applied to determine which nation's law creates and governs the causes of action and defenses. Once that choice of law determination has been made, requiring a second choice of law decision in connection with a statutory limitation of liability action would simply require more judicial effort; make results less predictable; and encourage more litigation and more appeals. A second choice of law determination is unnecessary and unjustified.

3. U.S. COGSA's Limitation Exception Does Not Create A Separate Rule For U.S. COGSA Claims.

The Ninth Circuit did not discuss section 8 of U.S. COGSA, 46 U.S.C. App. § 1308 because it has no bearing on this dispute.[5] That section preserves the vessel owner's right to petition for limitation of its liability. It says nothing about choice of law. The relevance of U.S. COGSA's application is that it means that the *Black Diamond* exception does not apply. Section 8 of U.S. COGSA does not give the vessel owner seeking to limit U.S. COGSA liabilities any greater rights than those of any other vessel owner seeking to limit its liability.

CONCLUSION

Petitioner argues that United States limitation law is out of step with the law of other maritime nations. It also argues that U.S. law provides for an inadequate recovery in

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[5]Section 8 provides: "The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels."

some situations. If so, that is because Congress has not seen fit to amend the statute. Petitioner has asked for review so that the Court can, on an inadequate record, make amends for Congress' failure to amend the statute.

There is not now, nor has there ever been, authority, justification or a need to require two separate levels of choice of law analysis in statutory limitation of liability actions. The only relevant choice of law to be made is the determination of which nation's law governs the causes of action and defenses asserted by the litigants. For that choice of law determination, *Lauritzen v. Larsen* governs in tort claims where there is no statutory mandate or contractual choice. Here, there is agreement by the parties that by both statutory mandate and contractual choice, United States law applies. Therefore, *Lauritzen* does not apply in this case and the Ninth Circuit was correct to ignore it.

No serious issue of law is presented by this case. There is no important question of federal law to be settled and the decision of the Ninth Circuit does not conflict with *Lauritzen* or any other decision of this Court.

Respondents request respectfully that the Court deny petitioner's Petition For Writ of *Certiorari*.

DATED: March 25, 1991.

Respectfully submitted,

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